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6 IN THE UNITED STATES DISTRICT COURT

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10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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JASON YATES,

No. C 04-02445 WHA

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Petitioner,

13

v.

**ORDER DENYING PETITION  
FOR WRIT OF HABEAS CORPUS**

14

STEWART RYAN,

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Respondent.

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**INTRODUCTION**

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Petitioner Jason Yates is currently serving a life sentence without parole for murder, robbery, and vehicle theft. After exhausting his remedies in state proceedings, he now seeks federal habeas relief pursuant to 28 U.S.C. 2254. Initially, respondent's motion to dismiss on ground of timeliness was granted. Petitioner appealed. At petitioner's request, this Court indicated a willingness to allow a Rule 60(b) motion if the Ninth Circuit were to remand the case for that limited purpose. The Ninth Circuit did so. In January 2008, petitioner's unopposed Rule 60(b) motion was granted. Respondent was ordered to answer accordingly. This order now reviews the petition on its merits. For the reasons stated below, the petition for habeas corpus is **DENIED**.

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**STATEMENT**

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The prosecution presented the following facts. In the late evening of April 13, 1993, Yates and his co-defendant James Keeter were driving in a pickup truck along the Monterey Highway. Yates kept a .20-gauge sawed-off shotgun and .410-gauge shotgun in the truck.

1 Both defendants agreed that Victim Frank Azevedo cut them off in his late model Mustang.

2 According to Keeter, Azevedo's actions enraged Yates.

3 To convince Azevedo to pull over, Yates imitated a police officer making a car stop.  
4 He activated a spotlight covered in red tape. Once Azevedo stopped, Yates used a loudspeaker  
5 (which investigators never recovered) to order Azevedo slowly out of the car, to step to the  
6 back of the car and lean against it. Azevedo did so with his feet and hands spread and his back  
7 to petitioner. Yates then killed Azevedo with one shot from a .410-gauge shotgun at close  
8 range into the side of his neck.

9 Petitioner's recollection of events was different. He agreed with Keeter that everything  
10 started when Azevedo cut him off on the highway. Yates denied, however, that he "pulled  
11 over" Azevedo. Rather, the victim signaled with his blinker that he was pulling over, and Yates  
12 followed accordingly. Azevedo exited the car, approached Yates, and complained about Yates'  
13 high beams. Yates purportedly apologized and shook hands with Azevedo. As the victim  
14 returned to his car, Keeter rushed up behind the victim and shot him to death. Regardless of  
15 which version of events was true, Azevedo was killed by a single shotgun blast to the left side  
16 of his neck or cheek from a weapon held two or three feet away and pointed downward.

17 After the murder, Yates and Keeter dragged and hoisted Azevedo's body into the pickup  
18 truck. (Yates testified that Keeter alone dragged the body into the truck.) Yates then drove the  
19 truck to a turnout on Metcalf Road. Keeter followed behind in Azevedo's mustang. At the  
20 turnout, Azevedo's body was thrown off a cliff into the ravine below. Yates and Keeter then  
21 drove back to Yates' home. They cleaned blood off their clothes and hosed out the back of the  
22 truck. That same night, Yates used Azevedo's credit card to purchase groceries. In addition,  
23 both Yates and Keeter drove to the home of Brett Bristow, a friend of Keeter's, to ask him to  
24 sell the stolen Mustang.

25 The police discovered the body the next day. Yates and Keeter were eventually arrested  
26 and charged by information with the following counts: Count One, which was for first-degree  
27 murder, with special-circumstance allegations that the murder had been committed by lying in  
28 wait and in the course of a robbery; Count Two, which was for robbery; and Count Three,

1 which was for the unlawful driving and taking of a vehicle. The information further alleged that  
2 both defendants had personally used a firearm during the crime.

3 During the trial, the prosecutor theorized that Yates and Keeter acted in concert to  
4 commit the crimes. Each defendant testified and accused the other of being the actual killer.  
5 They each denied aiding and abetting the murder and only claimed to be an accessory-after-the-  
6 fact. In November 1995, a jury convicted Yates on all counts. Keeter was acquitted of murder  
7 but convicted of being an accessory to a felony, robbery, and the unlawful taking of a vehicle.  
8 In June 1996, Yates was sentenced to life without parole for the murder and consecutive  
9 sentences for the robbery and gun use. The California Court of Appeal affirmed the judgment  
10 in June 1998, and the California Supreme Court denied review. Yates then unsuccessfully  
11 sought state habeas relief in the Santa Clara Superior Court, state appellate court, and the state  
12 supreme court. The California Supreme Court denied the petition on procedural grounds. On  
13 June 21, 2004, Yates sought federal habeas relief pursuant to 28 U.S.C. 2254.

#### 14 ANALYSIS

15 Under the Antiterrorism and Effective Death Penalty Act of 1996, habeas relief can be  
16 granted only if the state court decision is “contrary to, or involved an unreasonable application  
17 of, clearly established Federal law, as determined by the Supreme Court of the United States,”  
18 or is “based on an unreasonable determination of the facts in light of the evidence presented in  
19 the State Court proceeding.” 28 U.S.C. 2254(d). Yates filed his habeas petition after AEDPA’s  
20 effective date, so AEDPA applies.

21 Here, the California Supreme Court summarily denied state habeas petition by citing  
22 *In re Robbins*, 18 Cal. 4th 770, 780 (1998) (procedural bar to untimely claims). “Under the  
23 adequate and independent state grounds doctrine, a federal court will not review a question of  
24 federal law decided by a state court ‘if the decision of that court rests on a state law ground that  
25 is independent of the federal question and adequate to support the judgment.’ [A state’s]  
26 procedural default doctrine is a specific application of this adequate and independent state  
27 grounds doctrine. It bars federal habeas review ‘when a state court declined to address a  
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1 prisoner's federal claims because the prisoner had failed to meet a state procedural  
2 requirement.'" *Robinson v. Ignacio*, 360 F.3d 1044, 1051 (9th Cir. 2004).

3 The state, however, did not raise the procedural-default argument in its answer.  
4 Absent extraordinary circumstances, a procedural default argument is waived by failing to raise  
5 it. *Brown v. Maass*, 11 F.3d 914, 914-15 (9th Cir. 1993). AEDPA did not change this.  
6 See *Franklin v. Johnson*, 290 F.3d 1223, 1231, 1232-33 (9th Cir. 2002) (in post-AEDPA case,  
7 state waived procedural bar by failing to raise the issue in response to a habeas petition).  
8 Procedural default is an affirmative defense and should be raised in the first responsive pleading  
9 to avoid waiving it. *Morrison v. Mahoney*, 399 F.3d 1042, 1046-47 (9th Cir. 2005).  
10 Because respondent did not raise the issue of a procedural bar in its answer and instead  
11 addressed the merits of petitioner's claims, this order will review the merits of Yates' habeas  
12 petition.

13 Under AEDPA, a state court decision must be reviewed with deference. The statute  
14 provides a "highly deferential standard for evaluating state-court rulings," which demands that  
15 state-court decisions be given the benefit of the doubt." *Woodford v. Viscotti*, 537 U.S. 19, 24  
16 (2002) (per curiam). There are, however, some limitations to the AEDPA deference. In *Pirtle*  
17 v. *Morgan*, 313 F.3d 1160, 1167-68 (9th Cir. 2002), the Ninth Circuit stated (emphasis added):

18 [F]ollowing our sister circuits — the Third and the Fifth —  
19 we hold that *when it is clear that a state court has not reached the*  
*merits of a properly raised issue, we must review it de novo*.  
20 *See Appel v. Horn*, 250 F.3d 203, 210 (3d Cir.2001) (holding that a  
federal habeas court must review de novo purely legal issues and  
mixed questions of law and fact when, "although properly  
preserved by the defendant, the state court has not reached the  
merits of a claim thereafter presented to a federal habeas court");  
21 *Mercadel v. Cain*, 179 F.3d 271, 274-75 (5th Cir.1999) (per  
curiam) (*holding that "the AEDPA deference scheme outlined in*  
22 *28 U.S.C. § 2254(d)" did not apply to the federal habeas petition*  
*because the state denied the petitioner's motion for post-conviction*  
*relief on procedural grounds and not on the merits*). Nonetheless,  
23 under AEDPA, factual determinations by the state court are  
24 presumed correct and can be rebutted only by clear and convincing  
25 evidence.

26 Where the state court did not reach the merits of a particular claim, this order will review the  
27 claim *de novo*. Petitioner's claims are as follows.  
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1           **1. INEFFECTIVE ASSISTANCE OF COUNSEL.**

2           Petitioner asserts that he had ineffective assistance of counsel. *Strickland v.*  
3 *Washington*, 466 U.S. 668 (1984), is considered by the Ninth Circuit to be clearly established  
4 federal law for analyzing ineffective assistance of counsel claims. *Wilson v. Henry*, 185 F.3d  
5 986, 988 (9th Cir. 1999). *Strickland* sets forth a two-step standard that must be satisfied in  
6 order to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 687-88.

7           *First*, petitioner must show that counsel's representation fell below an objective standard  
8 of reasonableness. *Id.* at 668. The question is not what counsel could have done but whether  
9 the choices made by counsel were reasonable. *Babbitt v. Calderon*, 151 F.3d 1170, 1173  
10 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a  
11 court must strongly presume that counsel's actions falls within the wide range of reasonable  
12 assistance. *Strickland*, 466 U.S. at 688.

13           *Second*, petitioner must show that counsel's performance prejudiced petitioner and  
14 deprived petitioner of a fair trial and reliable results. A petitioner must prove that, but for  
15 counsel's errors, there is a reasonable probability that the result of the proceeding would have  
16 been different. *Id.* at 694. If the state's case were weak, there is a greater likelihood of a  
17 reasonable probability that the trial would have been different. *Johnson v. Baldwin*, 114 F.3d  
18 835, 839–40 (9th Cir. 1997).

19           **A. Forensic Expert.**

20           Petitioner argues that his trial counsel should have called a forensic expert to establish  
21 that the physical evidence — namely the gunshot pattern on the head of the victim —  
22 corroborated his testimony (and not Keeter's). Keeter had testified that the victim was shot as  
23 he leaned against the back of the car, with his hands extended forward and his head tilted  
24 slightly downward. The coroner testified that the wound in Azevedo's neck was 10 degrees  
25 with the horizontal plane and 15 degrees with the longitudinal plane.

26           Yates obtained the sworn declaration of defense forensic expert Robert Venkus who  
27 stated that, if the victim were positioned as described by Keeter, the wound path would have  
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1 been slightly upward and forward, from back to front.<sup>1</sup> Instead, according to the coroner's  
 2 report, the wound path was left to right and slightly downward, which was more consistent with  
 3 Yates' testimony that the victim was shot by Keeter while walking back to his vehicle with his  
 4 shoulders and head slightly bent forward. Had his trial counsel called a forensic expert,  
 5 Yates argues, the physical evidence would have contradicted Keeter's testimony.<sup>2</sup>

6       This order disagrees. Whether or not trial counsel acted reasonably need not be reached  
 7 because petitioner was not prejudiced. The trial record shows that Keeter's testimony about the  
 8 relative positions of the victim and shooter was unimportant. *First*, the wound path did not  
 9 prove that there was only one possible way Azevedo could have been killed — either in  
 10 accordance with Yates' version of Keeter's version of events. The coroner was asked at trial  
 11 whether "this wound [would] be consistent with someone being on their knees when the shot  
 12 was fired" (Resp. Exh. B at 413). The coroner answered that other scenarios were possible,  
 13 given the downward angle: "It's possible. But the only thing I can say, this is the angle. The  
 14 muzzle of the shotgun should be in a higher position to fire downward at this angle.  
 15 That scenario may be different, may be the person, the deceased, being on the knee or down,  
 16 and the shooter was firing from above or he was standing down below and the shooter was  
 17 standing on higher level and firing from that position" (*ibid.*).

18       *Second*, Keeter later testified during his cross-examination that he did not actually see  
 19 the gun being fired "because I, you know, I was just looking down in my lap, just shaking my  
 20 head, you know, like I can't believe this" (*id.* at 923). He was not entirely clear about the  
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 23       <sup>1</sup> The Venkus declaration was attached to Yates' federal habeas petition. It is unclear from the record  
 24 when exactly Yates introduced the Venkus declaration during the habeas process. The California Court of  
 25 Appeal affirmed the decision of the trial court in June 1998, and the California Supreme Court denied review in  
 26 September 1998. The declaration was dated July 9, 2001. In March 2002, Yates filed a third petition for writ of  
 27 habeas corpus with the California Superior Court (which was eventually denied). Yates admits that he  
 28 inadvertently did not attach the declaration to his state supreme court habeas petition. All that is clear from the  
 record is that Venkus was not called to testify on Yates' behalf during the trial.

29       <sup>2</sup> According to respondent, Yates has not provided a copy of the coroner's report, nor does it appear in  
 30 the list of exhibits introduced into evidence. (The list of exhibits can be found at Resp. Exh. A at 510–29.)  
 31 Respondent assumes for the sake of argument that Yates accurately characterized the coroner's report (Ans.  
 32 6–7, n.4 and n.5).

1 position of Yates and Azevedo during the actual killing. What he testified to was his  
2 speculation of Azevedo and Yates' relative positions.

3       *Third*, during closing arguments, the prosecutor stated that the wound path was  
4 downward but did not conclude who in fact was the actual killer or what Azevedo's actual  
5 position was. Petitioner's counsel, on the other hand, argued that petitioner's account was  
6 correct because Keeter was clearly taller than Yates and was therefore more likely to create the  
7 downward wound path. Nonetheless, the jury still found Yates to be the actual culprit. In sum,  
8 Keeter's testimony regarding the position of the victim and killer had little impact on the jury.  
9 There was no reasonable probability that a defense forensic expert rebutting Keeter's testimony  
10 would have produced a more favorable outcome for Yates here. There was no ineffective  
11 assistance of counsel.

12           **B.      Impeachment of Keeter.**

13       Yates contends that his trial counsel failed to impeach Keeter about the shooting of  
14 Azevedo. Keeter had testified that Yates ordered Azevedo out of the car, told him to lean in a  
15 spread eagle position over the back of the car, and shot him. According to petitioner, however,  
16 Keeter had told a different story to the police on April 29, 1993, sixteen days after the homicide  
17 (Pet. 14–15):

18       Keeter told Officer Zarate that Azevedo honked his horn and  
19 motioned for petitioner to pull over. Petitioner pulled over behind  
20 Azevedo's Mustang. Both stepped out of their vehicles and started  
21 cussing at each other. A fight ensued. Azevedo struck petitioner  
22 in the face and petitioner fell to the ground. Keeter told Zarate that  
23 petitioner got up, ran back to his truck, grabbed a gun from under  
24 the seat, ran over to Acevedo [sic] and stuck the gun in his face.  
25 Keeter told Zarate that he thought petitioner was just going to  
26 scare Azevedo. Keeter looked down, heard the gun shot, looked  
27 up and saw Azevedo fall to the ground.

28       Petitioner says that trial counsel never impeached Keeter with this statement.

29       Again, this order finds petitioner's arguments unavailing. Respondent is correct to point  
30 out that “[p]etitioner purports to quote from an account of what Keeter told the police . . .  
31 yet petitioner does not identify that account or suggest where it might be found in the record”  
32 (Ans. 13). There is no indication whatsoever in the record that this account even exists.  
33 Furthermore, no evidentiary hearing is necessary because, even if Yates were correct, there was

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1 no reasonable probability that the result of the proceeding would have been different,  
2 as discussed below.

3 Assuming *arguendo* that the statement existed (which this order does not concede),  
4 there was plenty of impeachment evidence against Keeter. Trial counsel cross-examined Keeter  
5 and established that Keeter had lied to the police when he said that Yates and Azevedo were  
6 fighting (Resp. Exh. B at 1125–26; *see also* 1177):

7 Q: Well, you told Officer Zarate that Jason and the Mustang driver  
8 were cussing each other out.  
9 A: Yes. I believe that's what I told him.

10 Q: And when you said that, was that the truth or was that a lie?

11 A: That's a lie.

12 Q: Chalk up another lie to you then. And you told Officer Zarate  
13 that Jason pushed the driver of that Mustang?

14 A: Yes, I did.

15 Q: Was that the truth or was that lie?

16 A: That's a lie.

17 Q: Chalk up a [sic] another lie to you.

18 These multiple stories were also addressed during Keeter's direct examination. Keeter admitted  
19 that he told the police that Azevedo hit Yates in the face "to make the reason why Jason killed  
20 him looked [sic] like self-defense" (*id.* at 981–984). During his closing argument, Keeter's trial  
21 counsel stated, "He's telling you, hey, you know, when I was interviewed by the cops I gave  
22 them the right information about who shot but I couldn't do that to Jason. I was trying to help  
23 him. I tried to make the story good about a fight and a this and a that so Jason's even got a  
24 ways to go" (*id.* at 2845). Yates' counsel repeatedly emphasized during his closing argument  
25 that Keeter lied (*id.* at 2895, 2901, 2902, 2907–08, 2918, 2960, 2962, 2967). This order finds  
26 that there was no prejudice to Yates as Keeter's credibility was impeached during the course of  
27 trial. Significantly, petitioner's traverse memorandum remains silent with respect to the points  
28 raised in respondent's answer; Yates does not dispute the lack of a record supporting his  
account, nor does he dispute that Keeter's credibility was savagely attacked. Consequently,

1 there was no ineffective assistance of counsel with respect to this claim.

2           **C.     Hearsay Statements.**

3           Yates next contends that trial counsel failed to object to hearsay statements offered by  
4 Keeter, Pamela Craig (Keeter's mother), and Cassandra Keeter (Keeter's sister). Witness Craig  
5 testified that Keeter told her that there was a murder, that he saw it and it scared him, and that  
6 petitioner threatened him (*id.* at 751). Similarly, Witness Cassandra Keeter testified that her  
7 brother had told her that something had happened that scared him badly and that he was going  
8 to get blamed for it — "basically, that he had seen something that Jason had did and that he  
9 couldn't stop it or control it and basically that he was scared" (*id.* at 765; *see also* 760, 770).  
10 Yates' trial counsel did not object to these statements. Because the trial was a "credibility  
11 contest between Keeter and petitioner," Yates argues, the admission of these statements tipped  
12 the scales in favor of Keeter.

13           Again, whether or not Yates' trial counsel acted reasonably need not be reached;  
14 there was no prejudice to petitioner caused by the admission of statements by Witness Craig  
15 and Cassandra Keeter. Assuming *arguendo* that the statements were hearsay, their testimonies  
16 added little to the case and could not have affected the outcome. On direct, Witness Craig  
17 stated that she "wouldn't let James tell [her] that much" (*id.* at 751). Defense counsel then  
18 cross-examined both witnesses. Witness Craig admitted that she did not know what role Keeter  
19 played in the crime and she never asked if he pulled the trigger. Cassandra Keeter also admitted  
20 that she stopped asking her brother about what happened because she was afraid of what the  
21 answer might be. She also did not realize that Keeter had left a ring at her house — a ring that  
22 had been stolen from Azevedo after he was killed. Cassandra Keeter did not seem to be aware  
23 of the more aggressive side of her brother, even when presented with evidence of his having  
24 threatened somebody over the sale of the victim's vehicle or destroying public property by  
25 shooting at street signs with a sawed-off shotgun. She also believed him to be a truthful person.  
26 She was, however, presented with evidence showing how Keeter had lied to police officers  
27 about the crime.

28           Keeter's counsel barely mentioned the testimonies of Witness Craig and Cassandra

1 Keeter during closing arguments: "And we learned about James as a real person with warts,  
2 with problems, problems with school, problems with family, problems with this, problems with  
3 that. Nobody sugar-coated him . . . Mom told you about that. Mom told you all about that.  
4 Yeah, well, you know, you go through a couple stories. If we get to the end, James can't live  
5 with himself and he tells you the truth. Even if it means getting up here and admitting to his  
6 participation, the part that he had to do in this overall thing, he gets to the truth. An interesting  
7 comment. Actually from, I believe, all 3 of them were character witnesses . . . It's his mom.  
8 It's his sister. This is his brother-in-law sort of, fiancé. Not one of them said, you know,  
9 James is just no trouble at all and never lies, honest as the day is long. But what they did tell  
10 you was they told you of a man who ultimately takes the responsibility for what he did"  
11 (*id.* at 2844–45). Neither Keeter's counsel nor the prosecutor brought up the statements again.

12 In sum, the jury was exposed to allegedly inadmissible hearsay statements about a  
13 co-defendant (who frequently lied) made by his mother and sister who knew little about the  
14 actual incident, knew little about Keeter's criminal side, and were biased in their desire to  
15 protect him. Keeter's counsel and the prosecutor did not find the specific testimony important  
16 enough to bring up again at the end of the case. There was no prejudice. Consequently,  
17 there was no ineffective assistance of counsel here.

#### 18 D. Opinion Evidence.

19 Petitioner argues that his trial counsel was ineffective because he failed to object to  
20 opinion evidence that Keeter was a follower and therefore could not be responsible for the  
21 homicide. Witness Craig, Cassandra Keeter, and Dan Donati (Keeter's friend) testified that  
22 Keeter was non-violent, passive, and a follower.

23 This argument goes nowhere. California Evidence Code § 1102 provides: "In a  
24 criminal action, evidence of the defendant's character or a trait of his character in the form of an  
25 opinion or evidence of his reputation is not made inadmissible by Section 1101 if such evidence  
26 is: (a) Offered by the defendant to prove his conduct in conformity with such character or trait  
27 of character." Petitioner has not explained in any of his memoranda why the evidence offered  
28 by Witnesses Craig, Keeter, and Donati was inadmissible.

1                   **E. Petitioner's Juvenile Convictions.**

2                   Petitioner contends that his trial counsel "stupidly assisted the prosecution" when he  
3 asked petitioner on direct examination about his juvenile convictions for possession of stolen  
4 property. On cross examination, petitioner described the conduct underlying those convictions.  
5 Yates now argues that trial counsel acted ineffectively because the evidence was inadmissible  
6 and trial counsel failed to object to the use of the evidence, nor did he request a limiting  
7 instruction. "Juvenile adjudications are not admissible for impeachment." *People v. Olivencia*,  
8 204 Cal. App. 3d 1391, 1403 (1988). Because Yates' trial counsel acted ineffectively, the jury  
9 was free to consider his prior bad acts.

10                  The California Supreme Court summarily denied without comment the petition for  
11 review on this claim. Here, petitioner is wrong on California law. Since *Olivencia*, the state  
12 court has allowed evidence of juvenile adjudications. "We conclude that under [*People v.*  
13 *Wheeler*, 4 Cal. 4th 284 (1992)], at least in cases which do not fall under Welfare and  
14 Institutions Code section 1772, the prosecution may introduce prior conduct evincing moral  
15 turpitude even if such conduct was the subject of a juvenile adjudication, subject, of course, to  
16 the restrictions imposed under Evidence Code section 352 and other applicable evidentiary  
17 limitations." *People v. Lee*, 28 Cal. App. 4th, 1724, 1740 (1994).<sup>3</sup> Because the evidence was  
18 properly admitted, there was no prejudice when trial counsel did not object to the evidence or  
19 ask for a limiting instruction.

20                  **F. .20-Gauge Shotgun.**

21                  Yates then says his counsel acted ineffectively when he failed to object to the  
22 prosecution's introduction of a .20-gauge sawed-off shotgun. The arresting officer testified that  
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26                  <sup>3</sup> California Welfare and Institutions Code Section 1772 addresses honorable discharge; release from  
27 penalties and disabilities; court petitions setting aside guilty verdict and dismissing accusation or information;  
28 remaining penalties and disabilities, including eligibility for appointment as peace officer. California Evidence  
Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is  
substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or  
(b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

1 Yates said that he had obtained the gun in exchange for dope. Because the victim had been shot  
2 with a .410-gauge shotgun, this evidence was irrelevant and therefore inadmissible, petitioner  
3 argues.

4 The California Supreme Court summarily denied review of this claim. This order finds  
5 that this evidence was relevant. The jury could have inferred, as the prosecutor asked it to,  
6 that both defendants were armed when they robbed and killed Victim Azevedo, regardless of  
7 who actually shot him. Petitioner had tried to argue that Keeter bought and used the .410-gauge  
8 shotgun. Because the evidence showed that Yates also purchased and used the .20-gauge  
9 shotgun before the homicide, the jury could infer that Yates knew how to fire shotguns and was  
10 therefore just as capable and willing as Keeter of killing Victim Azevedo. Because the  
11 evidence was relevant and admissible, there was no prejudice when trial counsel did not object  
12 on ground of irrelevance.

13 **G. Stolen Property Found in Petitioner's Truck after the Homicide.**

14 Yates claims that trial counsel should have objected when the prosecutor introduced  
15 evidence that stolen property in Yates' truck was found after his arrest. An officer had found  
16 nineteen pieces of stereo equipment with serial numbers ground off and stereo amplifiers inside  
17 a bag. The officer also testified that he found 82 grams of marijuana. The jury was therefore  
18 led to conclude that petitioner was a bad person because he dealt drugs and had a pattern of  
19 stealing property in exchange for drugs.

20 Review of this claim was denied by the California Supreme Court. This order holds that  
21 the evidence was admissible and trial counsel did not prejudice petitioner when he did not  
22 object to its introduction. Under California Evidence Code Section 1101(c), evidence is  
23 admissible if it were offered "to support attack the credibility of a witness." A police officer  
24 testified that Yates had said he purchased the stereo equipment at a flea market and was  
25 unaware of the marijuana. The disputed evidence here tended to show that Yates was not  
26 credible.

27 This evidence also supported Keeter's version of events. Keeter testified that he and  
28 Yates regularly burglarized cars. Yates said that Keeter was lying. This was relevant to the

1 case because Keeter had testified that he thought that they were only going to burglarize more  
2 cars the night of the homicide. This meant that there was little prejudice to Yates; Keeter  
3 provided testimony about their history with burglary, rendering it old news to the jury. There  
4 was no ineffective assistance of counsel regarding this claim.

5 **H. Stolen Tires.**

6 Trial counsel failed to object when the prosecutor introduced evidence that petitioner  
7 had stolen tires for his truck, petitioner says. This evidence prejudiced petitioner and influenced  
8 the jury to believe that Yates was a bad person who had a pattern of stealing.

9 The California Supreme Court denied review of this claim. For the same reasons stated  
10 above with respect to the stolen stereo equipment, this order holds that there was no ineffective  
11 assistance of counsel due to his failure to object to evidence of stolen tires.

12 **I. Stolen Ski Masks.**

13 Yates says that his trial counsel acted ineffectively when he failed to object to the  
14 testimony of Keeter's friends. According to their testimony, these friends saw petitioner steal  
15 ski masks prior to the homicide. Petitioner also allegedly told them after the homicide that the  
16 mask would come in handy during a robbery.

17 Review of this claim was denied by the state court. This order holds that the evidence  
18 was admissible and therefore there was no prejudice when trial counsel did not object to its  
19 introduction. *First*, petitioner mischaracterizes the testimony; nobody testified to actually  
20 seeing petitioner steal ski masks. Keeter's friend testified (Resp. Exh. B at 279):

21 Q: Did he [Yates] — did he say anything to you or anyone else  
22 about how he procured these ski masks from the store?

23 A: Um, I don't think so.

24 Q: Did he say he stole them?

25 A: I don't think so. I don't think he paid for them, though.

26 Q: Pardon?

27 A: I don't think he paid for them though. I never heard him say he  
28 stole them.

1 Shortly thereafter, the witness testified, “Um, I think, after he [Yates] got the ski mask, he said  
2 something about, these will come in handy to rob something. I wasn’t really paying attention”  
3 (*id.* at 281). *Second*, the evidence was relevant to show intent. During his trial, Yates claimed  
4 that he was depressed, suicidal, and participated in robbery after the homicide only because  
5 Keeter forced him to do so. The evidence rebutted this claim by showing Yates played a more  
6 active role and had the requisite intent for the crime. The evidence was admissible and there  
7 was no prejudice when trial counsel failed to object.

8                   **J. Keeter’s Testimony Concerning Burglary and Theft.**

9                   Keeter testified that petitioner broke into cars to steal stereos and was the one to dispose  
10 of the stolen property. During Keeter’s long experience with burglaries, theft, and possession  
11 of stolen property, Yates was the leader and Keeter was the follower. Trial counsel never  
12 objected to this testimony. Petitioner did not explain why this was inadmissible.

13                  The California Supreme Court denied review of this claim. This order holds that the  
14 evidence was relevant and therefore admissible. The evidence showed the relationship between  
15 Yates and Keeter and their previous criminal efforts, all of which was relevant as to how they  
16 acted with respect to the homicide and robbery. No prejudice resulted from the lack of an  
17 objection to properly admissible evidence.

18                   **K. Closing Arguments.**

19                  Petitioner contends that trial counsel was ineffective during closing arguments because  
20 (i) he failed to properly address Witness Marcus Amshoff’s testimony; (ii) he failed to argue  
21 that the physical evidence supported petitioner’s version of events rather than Keeter’s;  
22 and (iii) he failed to object to prosecutorial misconduct. The third claim will be discussed in a  
23 later section of this order.

24                  Respondent says that review of this claim must be highly deferential. “[C]ounsel has  
25 wide latitude in deciding how best to represent a client, and deference to counsel’s tactical  
26 decisions in his closing presentation is particularly important because of the broad range of  
27 legitimate defense strategy at that stage. Closing arguments should ‘sharpen and clarify the  
28 issues for resolution by the trier of fact,’ but which issues to sharpen and how best to clarify

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1 them are questions with many reasonable answers. Indeed, it might sometimes make sense to  
2 forego closing argument altogether. Judicial review of a defense attorney's summation is  
3 therefore *highly deferential — and doubly deferential when it is conducted through the lens of*  
4 *federal habeas.*" *Yarborough v. Gentry*, 540 U.S. 1, at 5–6 (2003) (per curiam) (emphasis  
5 added).

6 Petitioner says that doubly-deferential review does not apply to trial counsel's  
7 summation here because respondents failed to take into account the different posture. The  
8 claim pertaining to counsel's ineffectiveness during closing arguments was not decided by the  
9 state supreme court on the merits. Without reaching this issue, this order will assume *arguendo*  
10 that the doubly-deferential review does not apply.

11 Yates argues that Witness Amshoff's testimony corroborated his version of the facts,  
12 which his trial counsel failed to use during closing arguments. Witness Amshoff testified that  
13 the crime occurred behind the sound wall where his house was located. He said that he could  
14 see and hear what was happening on the other side of the wall. He said that he did not see any  
15 red lights when he heard the two vehicles stop behind the wall. According to petitioner,  
16 this evidence corroborated his own testimony that he stopped his vehicle because of the victim's  
17 hand gestures (and not because he simulated a police stop, per Keeter's testimony). In addition,  
18 Witness Amshoff said that he heard the cars come to an abrupt stop, not a gradual one, as  
19 Keeter testified.

20 This order finds that there was no prejudice because the aspects of the witness's  
21 testimony that petitioner wanted greater emphasis on were not that helpful to his case.  
22 Witness Amshoff suggested that, although the sound wall blocked him from seeing the actual  
23 incident, he should have been able to see flashing lights in the trees (Resp. Exh. B at 434–35):

24 Q: And as you turned to look, what, if anything, of lights did you  
25 see?

26 A: I don't recall seeing any lights, because they are below the  
27 level of eyesight, below the level of the wall at that point. The  
lights would be, well, they would actually probably be below the  
level I was standing on behind the wall, behind the raised railroad  
tracks. So —

28

Q: In that dark area, if it had been like you thought, a police car flashing a red light, might you have been able to see the red light reflecting the surrounding environment?

A: That would have been something that, you know, in retrospect, yeah, I should have been able to see some lights on the trees. Right there, there's trees there, plus I had five trees on my back wall.

Q: And you saw nothing of any lights of any nature.

A: No, I did not.

This was speculative, however; the witness was merely guessing at what he thought flashing police lights would look like. He never said that he knew that he would have seen the reflection of flashing lights. Moreover, it was possible that Yates had stopped flashing the lights by the time Witness Amshoff began to pay closer attention to what was happening. Finally, how the cars came to a stop was not something that created the reasonable probability that the result of the proceeding would have been different.

Yates further contends that his trial counsel did not argue that physical evidence supported his version of the homicide. Medical examiner Massoud Vameghi testified that there was a downward shot pattern. Had Keeter been telling the truth, the angle of the shot would have been upward and not downward. (This claim has been addressed in an earlier section of this order.) This order finds that there was no prejudice. Trial counsel *did* argue that physical evidence supported Yates' version of the facts: he said that Keeter was taller than petitioner and Azevedo and was therefore the actual person who made the downward shot. There was no ineffective assistance of counsel.

Petitioner maintains finally maintains that his appellate counsel was ineffective for failing to raise on appeal the argument that his trial was fundamentally unfair and in violation of the Due Process clause. Appellate counsel should have raised the issues discussed in Sections 2–4 below. This order disagrees, noting that a defendant has no constitutional right to compel appellate counsel “to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.” *Jones v. Barnes*, 463 U.S. 745 (1983). Even assuming that appellate counsel should have raised these points, there was no resulting prejudice, as discussed below.

1           **2.       “ACQUITTAL FIRST” INSTRUCTION.**

2           The jury was instructed as follows (Resp. Exh. B at 3041, 3050–51):

3           The court cannot accept a verdict of guilty of second-degree  
4           murder as to Count I unless the jury also unanimously finds and  
5           returns a signed verdict form of not guilty as to murder of the first  
6           degree in the same count.7           However, the court cannot accept a guilty verdict on a lesser crime  
8           unless you have unanimously found the defendant not guilty of the  
9           charge or greater crimes.10          Petitioner argues that these instructions violated his due process rights because they required  
11         him to prove he was not guilty of the greater offense before the jury could return a verdict on  
12         any lesser offense. This shifted the burden of proof and created an improper presumption, says  
13         petitioner.14          “Our cases make clear that ‘[s]uch shifting of the burden of persuasion with respect to a  
15         fact which the State deems so important that it must be either proved or presumed is  
16         impermissible under the Due Process Clause.’” *Francis v. Franklin*, 471 U.S. 307, 317 (1985).  
17          The Supreme Court has also not “foreclose[d] the possibility that in an unusual case,  
18         a deliberate and especially egregious error of the trial type, or one that is combined with a  
19         pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant  
20         the grant of habeas relief, even if it did not substantially influence the jury’s verdict.” *Brech v.  
Abrahamson*, 507, U.S. 619, 638 n.9 (1993). Petitioner contends that the instruction was such  
21         an egregious error that he is entitled to habeas relief.22          This order disagrees. “The Supreme Court has established that ‘in reviewing an  
23         ambiguous instruction . . . we inquire whether there is a reasonable likelihood that the jury has  
24         applied the challenged instruction in a way that violates the Constitution.’ Indeed, ‘the proper  
25         inquiry is not whether the instruction ‘could have’ been applied in an unconstitutional manner,  
26         but whether there is a reasonable likelihood that the jury *did* so apply.’” *Byrd v. Lewis*,  
27         510 F.3d 1045, 1052 (9th Cir. 2007). Here, Yates provides no analysis (or supporting authority)  
28         explaining how the sequence of returning verdicts created a reasonable likelihood that the jury  
               applied the instruction in a way that violated his due process rights. Nor does he address any of  
               this in his traverse memorandum. The jury was merely instructed to not return a guilty verdict

1 on a lesser crime unless it had first found the defendant not guilty of the greater crime. How  
 2 this constituted an egregious error is a mystery.

3 Yates further argues that the instruction “invited a compromise verdict” (Pet. 26).  
 4 He explains: “If a juror thought that petitioner was not guilty of murder but guilty of some  
 5 lesser included homicide, that juror was required to convince the other jurors that petitioner  
 6 was not guilty of murder in the first or second degree, beyond a reasonable doubt, before the  
 7 jury could reach a verdict of guilty on a lesser degree of homicide. Finding himself in the  
 8 minority, the instruction placed the juror in the position of either giving up, or compromising.  
 9 Therefore, the instruction amounted to an invitation to compromise” (*ibid.*). He cites  
 10 *United States v. Jackson*, 726 F.2d 1466, 1469 (9th Cir. 1984):

11 The danger to the defendant of the charge requiring acquittal of  
 12 the greater offense before the lesser offense is considered is clear:  
 13 “If the jury is heavily for conviction on the greater offense,  
 14 dissenters favoring the lesser may throw in the sponge rather than  
 cause a mistrial that would leave the defendant with no conviction  
 at all, although the jury might have reached sincere and unanimous  
 agreement with respect to the lesser charge.”

15 *Jackson* is inapposite. There, the trial court did not even allow the jury to consider the  
 16 lesser offense unless the jury first unanimously acquitted the defendant of the greater offense.  
 17 “Under this instruction, the jury could not consider the lesser offense at all if unable to agree on  
 18 a verdict for the greater offense.” *Jackson*, 726 F.2d at 1470. In Yates’ situation, the jury was  
 19 not told how or in what order to consider the lesser offense. The jury was allowed to consider  
 20 the lesser offense — it merely had to *find and return* a not guilty verdict on the greater crime  
 21 before it could *find and return* a guilty verdict on the lesser crime. There is nothing to support  
 22 petitioner’s contention of impropriety by the trial court or prejudice by trial counsel with respect  
 23 to these instructions.

24       **3. TRIAL COURT’S JURY INSTRUCTION REJECTING  
 25 THE TESTIMONY OF A WITNESS.**

26       The jury was instructed as follows (Resp. Exh. B at 3021):

27       A witness who is willfully false in one material part of his or her  
 28 testimony is to be distrusted in others. You may reject the whole  
 testimony of a witness who willfully has testified falsely as to a  
 material point, unless from all the evidence you believe the  
 probability of truth favors his or her testimony in other particulars.

1 Petitioner argues that the instruction violated due process of law because it allowed the jury to  
2 convict him upon proof “by probability of the truth of the evidence” rather than by proof  
3 beyond a reasonable doubt. Even if the jury were skeptical of a witness’ testimony, a defendant  
4 could still be convicted if the jury found that the “probability of truth” supported the witness’  
5 testimony. “Lest there remain any doubt about the constitutional stature of the reasonable-  
6 doubt standard, we explicitly hold that the Due Process Clause protects the accused against  
7 conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute  
8 the crime with which he is charged.” *In re Winship*, 397 U.S. 358, 363 (1970). In the instant  
9 action, the jury believed the testimony of Keeter over that of Yates. Yet, Keeter made various  
10 inconsistent and untruthful statements, according to petitioner. The jury nonetheless convicted  
11 petitioner upon a “probability of truth.”

12 This argument is completely unpersuasive. In *Turner v. Calderon*, 281 F.3d 851  
13 (9th Cir. 2002), the Ninth Circuit examined the same instruction, which was taken from  
14 California Criminal Jury instruction 2.21.2, the willfully-false witness instruction. The Ninth  
15 Circuit held that “[n]o reasonable jurist could conclude that, viewed in context, this ‘instruction  
16 by itself so infected the entire trial that the resulting conviction violates due process.’”  
17 *Id.* at 865–66. There was no prejudice here.

18 Furthermore, defense counsel acted reasonably when he did not object to the instruction.  
19 As the defense continued to assert that Keeter was lying throughout the trial, counsel could use  
20 the instruction to argue that Keeter’s testimony should be rejected in whole. Petitioner does not  
21 dispute this in his traverse memorandum.

22 **4. UNANIMITY INSTRUCTION.**

23 Yates was charged with murder on the theories of implied and express malice and felony  
24 murder. Petitioner next argues that the trial court failed to give and trial counsel failed to  
25 request a unanimity instruction. He cites *People v. Mickle*, 54 Cal. 3d 140, 178 (1991),  
26 to support the proposition that petitioner was entitled to a unanimity instruction under  
27 California law: “[T]he requirement of jury unanimity in criminal cases is of constitutional  
28 origin. It is primarily intended to ensure that jurors agree upon a particular act where evidence

1 of more than one possible act constituting a charged criminal offense is introduced.” Petitioner,  
2 however, misstates state law. His position also contradicts federal law.

3 According to California law, “[a]s for defendant’s separate claim that a unanimity  
4 instruction should have been given, we find no reason to depart from our cases that have  
5 ‘repeatedly rejected this contention, holding that the jurors need not unanimously agree on a  
6 theory of first-degree murder as either felony murder or murder with premeditation and  
7 deliberation.’” *People v. Morgan*, 42 Cal. 4th 593, 617 (2007). *See also People v. Box*,  
8 23 Cal. 4th 1153, 1212 (2000). Nor does federal law require a unanimity instruction.  
9 “In [*Schad v. Arizona*, 501 U.S. 624 (1991)], the Supreme Court held that it was constitutional  
10 for the State of Arizona to require only a general verdict for first-degree murder based on either  
11 premeditation or felony murder without jury unanimity as to which theory applied.” *Sullivan v.*  
12 *Borg*, 1 F.3d 926, 927 (9th Cir. 1993). No unanimity instruction was required here. Nor does  
13 petitioner address this in his traverse memorandum.

14 **5. PROSECUTORIAL MISCONDUCT.**

15 Yates says that his trial was fundamentally unfair because the prosecutor was guilty of  
16 prejudicial misconduct during his closing argument when he appealed to the anger and passions  
17 of the jury. Yates cites *Bains v. Cambra*, 204 F.3d 964, 974–75 (9th Cir. 2000), claiming that  
18 the Ninth Circuit condemns argument that is inflammatory or appeals to bias or prejudice.

19 This order disagrees with petitioner’s use of *Bains*. In *Bains*, the Ninth Circuit held that  
20 the Ninth Circuit violated the defendant’s federal due process and equal protection rights when,  
21 in closing arguments, he emphasized permissible testimony concerning the beliefs of the Sikh  
22 religion in a manner that went beyond providing evidence of motive and intent underlying the  
23 alleged murder and invited the jury to rely on prejudices and racial, ethnic, and religious  
24 stereotypes. Here, the parts of the prosecutor’s argument that petitioner finds objectionable  
25 were much less inflammatory. Petitioner objects to the following excerpts: “George Azevedo  
26 was ordered out of the car, and George Azevedo was executed” (Resp. Exh. B at 3000).  
27 “The callousness of the manner of death and the lack of remorse is appalling. This brutal crime  
28 is a blot on our community” (*id.* at 2997).

1        This language did not constitute prejudicial misconduct. The prosecutor's remarks  
2 would have to have "so infected the trial with unfairness as to make the resulting conviction a  
3 denial of due process." *Hall v. Whitley*, 935 F.2d 164, 165 (9th Cir. 1991). A prosecutor can  
4 make permissible inferences drawn from the evidence. *Duckett v. Godinez*, 67 F.3d 734, 742  
5 (9th Cir. 1995). This order finds that none of the "objectionable" comments rose to the level of  
6 a remark that so infected the trial with unfairness as to make the resulting conviction a denial of  
7 due process.

8        Yates further argues that the prosecutor introduced false evidence: "[h]e used a  
9 mannequin [sic] falsely depicting the shot angle in order to sell his case that petitioner's version  
10 of the homicide was a lie and Keeter'a [sic] was the truth" (Pet. 33). The Supreme Court has  
11 acknowledged "[t]he principle that a State may not knowingly use false evidence, including  
12 false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty."  
13 *Napue v. People of State of Illinois*, 360 U.S. 264, 269 (1959).

14       Again, the claim that the prosecutor introduced false evidence is untrue. The record  
15 does not show that the prosecutor falsely depicted the angle of the shot. The prosecutor  
16 indicated that the demonstration was inexact (Resp. Exh. B at 2996): "The angle of the wound,  
17 the wound in George Azevedo's body. We have this for you to play with. My only regret is  
18 that the coroner did not find a more substantial piece of rod which would have maintained its  
19 straight shape, but I'm sure that you can bend it straight and get a good, close approximation of  
20 the angle." In addition, there was little prejudice given the rest of the evidence regarding the  
21 gunshot. Even if the angle of the rod depicting the gunshot into the mannequin's head were  
22 incorrect, it just had to be downward, in accordance with the coroner's testimony. This could  
23 have been caused by numerous scenarios and not just by the disparate height of the two  
24 co-defendants. This did not constitute false evidence. Nor was it the kind of evidence that  
25 tainted court proceedings.

26       **6. APPOINTMENT OF NEW COUNSEL FOR  
27 PETITIONER'S MOTION FOR A NEW TRIAL.**

28       After the jury returned a guilty verdict, petitioner moved to appoint new counsel to help  
him prepare a motion for new trial on the ground of ineffectiveness of counsel. Petitioner now

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1 argues that he was denied due process because the trial court refused to appoint different  
2 counsel for the motion for new trial. “The ultimate constitutional question the federal courts  
3 must answer here . . . [is] whether this error actually violated [petitioner’s] constitutional rights  
4 in that the conflict between [petitioner] and his attorney had become so great that it resulted in a  
5 total lack of communication or other significant impediment that resulted in turn in an  
6 attorney-client relationship that fell short of that required by the Sixth Amendment.” *Schell v.*  
7 *Witek*, 218, F.3d 1017, 1026 (9th Cir. 2000). The California Supreme Court denied review of  
8 this claim.

9 Petitioner says that an evidentiary hearing is appropriate here. He first argues that the  
10 state trial court inadequately inquired into whether the attorney-client relationship had  
11 deteriorated. The state court only focused on whether Yates had a valid claim of ineffective  
12 assistance of counsel based on counsel’s alleged omissions or misdeeds. Yates further argues  
13 that he has shown an irreconcilable conflict that required substitution of counsel. His attorney  
14 clearly could not argue to his own ineffectiveness.

15 This order disagrees with petitioner for the following reasons. *First*, this order finds that  
16 the trial court went to great lengths to fulfill petitioner’s wishes. Upon petitioner’s request,  
17 the trial court granted petitioner’s request to discharge his retained trial counsel and appoint a  
18 public defender in his stead. After the public defender advised the court that it could not take  
19 the case, petitioner’s original trial counsel was reappointed. Petitioner then wrote a letter to the  
20 trial court, stating that he and his counsel had an irreconcilable conflict that required him to  
21 obtain new counsel. The court held *Marsden* hearings on March 1, 1996, and March 8, 1996.  
22 The trial court denied the motion and petitioner’s original counsel remained in place.  
23 Shortly thereafter, a new motion for incompetency of counsel was filed, raising additional  
24 issues. The state trial court granted defense counsel’s request for more time to assess whether  
25 to file the motion. According to a minute order in the clerk’s transcript for April 19, 1996,  
26 petitioner “submits motion for new trial (not filed)” (Resp. Exh. A at 564). Defense counsel  
27 finally advised the court that he would be filing a motion that addressed some of the issues  
28 raised by Yates. He then filed a “motion to dismiss or modify conviction of PC 187 and to

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1 impose proportional sentence" (*id.* at 567). This motion was denied. This order finds that the  
2 trial court bent over backwards to try and obtain appropriate counsel and to hear petitioner's  
3 motions.

4 *Second*, petitioner was given ample opportunity to address these issues at the *Marsden*  
5 hearing. The state trial court stated in the March 8 hearing, "This matter has been continued at  
6 the court's direction for a further hearing, as the court has characterized it, pursuant to *People*  
7 *versus Marsden* and *People versus Smith* to allow the defendant *to articulate any further*  
8 *reasons that he feels are appropriate to bring to the court's attention*, any act of omission or  
9 misconduct of his counsel during the trial" (Trav. Exh. N at 3) (emphasis added). Yates then  
10 raised numerous claims, which he admits in his traverse memorandum (Trav. 14). Yates stated  
11 before the trial court that he had problems with counsel (Trav. Exh. N at 5): "In the  
12 attorney-client agreement that was made and signed by myself and Mr. Herrera [trial counsel],  
13 agreement number six states that the attorney agrees to represent client to the best of his ability  
14 in a vigorous and professional pursuit of client's interest. I'm sorry to say that Mr. Herrera has  
15 fallen severely short of this agreement" (*id.* at 5). After the two *Marsden* hearings in March,  
16 the state trial court concluded, "Then having that representation [that Yates did not intend or  
17 cause other counsel to bring a motion for a new trial based on the incompetency of counsel]  
18 and the court's examination of the alleged grounds and its own independent elevation [sic]  
19 of this issue, I'm going to find that there are no grounds for a motion so far as I can determine at  
20 this point, nor is one properly before the court or could be before the court a motion for new  
21 trial relative to incompetency of counsel" (*id.* at 7).

22 *Third*, there is simply no authority supporting the proposition that a defendant is entitled  
23 to new counsel for presenting a new trial motion once a trial court has determined, after trial,  
24 that trial counsel can continue to competently represent the defendant. *See Wood v. Georgia*,  
25 450 U.S. 261, 273–74 (1981) ("If the court finds that an actual conflict of interest existed at that  
26 time, and that there was no valid waiver of the right to independent counsel, it must hold a new  
27 revocation hearing that is untainted by a legal representative serving conflicting interests").  
28

1        *Fourth*, there is no prejudice. Petitioner has raised numerous ineffective-assistance-of-  
2 counsel claims in the instant federal habeas petition. This order has reviewed these claims and  
3 finds that counsel either did not act unreasonably nor there was no resulting prejudice.  
4 Consequently, petitioner's claim that the state trial court erred when it did not substitute counsel  
5 fails.

6              **7. JUDICIAL MISCONDUCT.**

7        Petitioner contends that his trial counsel erroneously argued evidence that was not  
8 before the jury. This evidence came from portions of the preliminary hearing testimony of  
9 Witness Richard Tucker that had been excluded by stipulation. Trial counsel explained that he  
10 had not properly marked the excised portions and inadvertently used them in his closing  
11 argument. Petitioner then says that the trial court engaged in judicial misconduct when he made  
12 "unnecessary disparaging remarks about defense counsel" where a "simple admonition would  
13 have sufficed." The trial court stated (Pet. 36) (emphasis added by petitioner):

14        Previously I have advised you that statements of counsel made  
15 during their closing arguments are not to be construed as evidence.  
16 That applies to all statements made by the attorneys in their  
17 closing arguments. However, I feel that it is appropriate to advise  
18 you further that during the argument that you just heard, Mr.  
19 Herrera [trial counsel] made reference to an alleged prior  
20 testimony of one Richard Tucker to the effect that James Keeter  
21 had told him that there was a struggle in the acquisition of the  
22 Mustang and that Brett Bristow mentioned the same struggle to  
23 him. *This was a grossly negligent misstatement of fact.* You heard  
24 the testimony of Richard Tucker read to you, and it contained no  
25 such mention of statements by Keeter or by Mr. Bristow to Mr.  
26 Tucker whatsoever. *Counsel have all had copies of Mr. Tucker's*  
27 *prior testimony and know that there is no such testimony.* You are  
28 to find that there is no mention of the alleged statements and to  
disregard their implication. *Further you are to find that Mr.*  
*Herrera made such statements with the intention to strengthen his*  
*arguments, to influence your deliberations.*

29        The state appellate court rejected this claim with an opinion on the merits (Resp. Exh.  
30 G). The claim of judicial misconduct deserves full deferential review, as conceded by  
31  
32  
33  
34

1 petitioner. This order finds that petitioner's characterization of the admonition is incorrect,  
2 especially when giving deference to the state appellate court. The state appellate court held  
3 (*id.* at 7–8):

Both parties acknowledge the test for judicial misconduct.  
A trial court commits misconduct if it persistently makes  
discourteous and disparaging remarks to defense counsel so  
as to discredit the defense or create the impression it is  
allying itself with the prosecution.” A judge’s comments  
are evaluated ““on a case-by-case basis, noting whether the  
peculiar content and circumstances of the court’s remarks  
deprived the accused of his right to trial by jury.’ ‘The  
propriety and prejudicial effect of a particular comment are  
judged both by its content and by the circumstances in  
which it was made.”” In this case the trial court’s  
instruction did not constitute misconduct. The court  
properly exercised its duty to control the proceedings by  
correcting the prejudicial comment of Mr. Herrera. The  
resulting admonition was entirely justified, particularly in  
light of the court’s concern that a co-defendant’s defense  
might otherwise be impaired.

13 Giving the state appellate court appropriate deference, this order holds that there was no  
14 reasonable likelihood that the jury misapplied the law from this alleged instructional “error.”  
15 *See Byrd*, 510 F.3d at 1052.

## **8. CUMULATIVE PREJUDICE.**

Finally, Yates contends that he was prejudiced because of the cumulative impact from the numerous errors committed by the trial court, defense counsel, and the prosecutor. "It is true that, although individual errors may not rise to the level of a constitutional violation, a collection of errors might violate a defendant's constitutional rights." *Davis v. Woodford*, 384 F.3d 628, 654 (9th Cir. 2004). Nonetheless, Yates' argument of cumulative prejudice fails. Yates has not demonstrated prejudice as to the individual claims, and the nature of the claims does not support a conclusion of cumulative prejudice. This order finds that Yates' trial was not rendered fundamentally unfair.

## CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is **DENIED**.

27 || IT IS SO ORDERED.

28 || Dated: July 14, 2008.

**WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE**